



## Santa Clara Law Review

Volume 28 | Number 4

Article 5

1-1-1988

# Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866

Leroy K. Latta Jr.

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

### Recommended Citation

Leroy K. Latta Jr., *Public Access Over Alaska Public Lands as Granted by Section 8 of the Lode Mining Act of 1866*, 28 SANTA CLARA L. REV. 811 (1988).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol28/iss4/5>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

# PUBLIC ACCESS OVER ALASKA PUBLIC LANDS AS GRANTED BY SECTION 8 OF THE LODE MINING ACT OF 1866

Leroy K. Latta, Jr.\*

## I. INTRODUCTION

Throughout much of the nation, miles and miles of highway rights-of-way cross the public domain.<sup>1</sup> Many of these rights-of-way were granted under the authority of section 8 of the 1866 Lode Mining Act (Act).<sup>2</sup> Section 8, commonly referred to as R.S. 2477,<sup>3</sup> is a simply worded grant which provides: "The right of way for the construction of highways over public lands, not reserved for public uses,

---

© 1988 by Leroy K. Latta, Jr.

\* B.S., 1977, California State University, Fresno, School of Engineering; J.D., 1988, Northwestern School of Law, Lewis and Clark College, Certificate in Environmental and Natural Resources Law. The author gratefully acknowledges the guidance of Northwestern School of Law Adjunct Professor Gary Meyers, Professor Donald W. Large, Professor Michael Blumm, and the author's wife, Kristin S. Knudsen, J.D., 1978, Santa Clara University. He also acknowledges the research assistance provided by employees of the Municipality of Anchorage, the State of Alaska and the United States government.

1. C. WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 139-40 (1983).

2. The Act is actually entitled "An Act granting the Right-of-way to Ditch and Canal Owners Over the Public Lands, and Other Purposes," 14 Stat. 251 (1866).

3. This section is also known as the Federal Highway Grant Act, Highway Grant Act, Highway Act of 1866, Right-of-Way Act—Highways, Right-of-Way of Canal Owners, and the Legislation as to Drainage.

Researching section 8 is complicated because it is referred to by several names in the reporters, for example: the Act of July 26, 1866, ch. 262, 14 Stat. 253; Revised Statutes U.S. § 2477 (1878); Section 2477, Compiled Laws U.S.; 2477, R.S.U.S.; U.S. Comp. Stats. 1901, 1567; U.S.C.S. 1916, § 4919; 43 U.S.C. § 932 (1970) (repealed 1976).

43 U.S.C. § 932 (1970) was repealed Oct. 21, 1976 by the Federal Land Policy Management Act (FLPMA) of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793.

A valid R.S. 2477 highway right-of-way is a valid existing right which is protected by FLPMA § 509 (43 U.S.C. § 1769(a) (1982)) and § 701(a) (43 U.S.C. § 1701 note (1982)), by the Alaska Native Claims Settlement Act (ANCSA), Pub. L. No. 92-203, § 14(g), Dec. 18, 1971, 85 Stat. 702; Pub. L. No. 95-178, § 2, Nov. 15, 1977, 91 Stat. 1369; Pub. L. No. 96-487, Title XIV, §§ 1404, 1405, 1406 (a)-(d), Dec. 2, 1980, 94 Stat. 2493, 2494 (43 U.S.C. 1613(g) (1982)); and by the Alaska National Interest Lands Conservation Act (ANILCA) of 1980, Pub. L. No. 96-487, Title XI, § 1109, 94 Stat. 2464 (16 U.S.C. § 3169 (1982)). See also 73A C.J.S. *Public Lands* § 69 (1983).

"Valid existing rights" are those rights short of vested rights that are immune from denial or extinguishment by the exercise of secretarial discretion." The Bureau of Land Management Wilderness Review and Valid Existing Rights, 88 Interior Dec. 909, 912 (1981).

is hereby granted."<sup>4</sup>

This article addresses problems raised by inconsistent United States Department of Interior (USDI) policy and administrative practices concerning rights-of-way granted by R.S. 2477. The inconsistency has produced conflicting interpretations of R.S. 2477 grants in writings of the Interior Board of Land Appeals (IBLA),<sup>5</sup> opinions of the Office of the Solicitor, staff memoranda and departmental regulations.

Federal interest in R.S. 2477 arises from the federal government's need to identify prior existing land rights for federal land planning and transfer.<sup>6</sup> Current Department of Interior administrative policy requires that the assertion of rights of way be accurate and thorough.<sup>7</sup> This requirement implies that planning identification must equal the accuracy of land title recordation.<sup>8</sup> However, R.S. 2477 assertion is simply for planning identification. It is not required by the Act and does not retain the permanency of a judicial determination of right-of-way. The standard imposed by the Department of Interior exceeds that required for location and planning, and results in an undue burden upon the public by frustrating access preservation.

The State of Alaska and many private individuals have asserted R.S. 2477 rights-of-way during the land planning process.<sup>9</sup> Alaska's interest in R.S. 2477 rights-of-way results in part from the lack of a developed road network and from the lack of other provisions in land management plans addressing the need for essential public access for commerce, industry, subsistence and recreation.<sup>10</sup> Also providing impetus for Alaska's concern with R.S. 2477 is the use of the highway

---

4. See generally *Sun Studs, Inc.*, 83 Interior Dec. 518, 524 (1976) (the most general grant of access).

5. See generally Day, *Administrative Procedures in the Department of the Interior: The Role of the Office of Hearings and Appeals*, 17 ROCKY MTN. MIN. L. INST. 1 (1972).

6. See *infra* text accompanying notes 24 and 41.

7. See *infra* text accompanying notes 57 and 66.

8. See *infra* text accompanying note 56.

9. See *infra* text accompanying notes 14, 22, and 41.

10. D. Hempel, Issue Paper: Revised Statute 2477 Rights-of-Way in Alaska, (Mar. 17, 1986) (available from USDI, BLM, Fairbanks District Office, Fairbanks, Alaska, file 2822 (230)). A final federal policy paper entitled Alaska Federal Agency RS 2477 Policy for the Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service is currently being coordinated by Ms. Sue Wolf, USDI, BLM (932), Anchorage, AK. This is a policy paper only and will not have the effect of regulation or statute. Ms. Wolf presented a draft of the policy paper at the 23rd Annual Alaska Surveying and Mapping Conference, February 8-12, 1988. S. Wolf, RS 2477—The Law—The Controversy—The Policy, Technical Proceedings at 127 (1988); See generally Saxon & Perkins, *Access Across Lands in Alaska*, 3 AM. L. OF MINING § 73.01 (2d ed. 1984).

right-of-way grant for utility corridors. Resolution of R.S. 2477 offer and acceptance standards is basic to both the settlement of land claims in Alaska and to the stability of land titles throughout the public lands states where actual construction of highways occurred years after easements were reserved on the lands.<sup>11</sup>

R.S. 2477 was repealed by the Federal Land Policy Management Act (FLPMA) in 1976. The repeal occurred prior to the large influx of population to Alaska associated with the economic expansion which followed the Trans-Alaska Pipeline. R.S. 2477 rights-of-way nevertheless remain important to preserve traditional bush access routes and historical trails established prior to FLPMA, including easements along section lines actually surveyed across the public domain prior to repeal.<sup>12</sup> The Alaska territorial and state governments have enacted section line easement laws for the construction of highways centered on the exterior boundaries of sections of land (one mile squares created by the rectangular survey of the public lands into townships) as a right-of-way acceptance under R.S. 2477.<sup>13</sup>

There are approximately 1,400 historic trails in Alaska which are possible, valid existing R.S. 2477 highways.<sup>14</sup> This surface transportation system was created by homesteaders, miners, farmers, Natives, and the federal Alaska Road Commission.<sup>15</sup> Approximately 85% of the trails accessed mines; others were dogsledding trails for mail carriers. Hundreds of other trails connected villages.<sup>16</sup> These

---

11. State of Alaska's Amicus Curiae Brief at 2, *Alaska Greenhouses, Inc. v. The Municipality of Anchorage, et al.*, No. A-85-630 (D. Alaska 1987) [hereinafter Amicus Curiae Brief].

The thirty public land states are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin, and Wyoming. 170 PUBLIC LAND STATISTICS 114 (Apr. 1986).

The public lands criteria is discussed *infra* in the text accompanying notes 99-104.

12. See *infra* note 152.

13. See *infra* note 152. See also J. Sedwick, *The Law of Section Line Easements in Alaska* (unpublished manuscript presented at the Alaska Surveying & Mapping Conference in Anchorage, Alaska) (1983); 3 AM. L. MINING § 73.01 (2)(e) (2d ed. 1984).

14. D. Foster, *State, Natives, Feds Wrangle Over Who Owns Historic Trails*, Anchorage Daily News, Jan. 29, 1986 reprinted in ALASKA SENATE TRANSPORTATION COMMITTEE, RS 2477 TASK FORCE REPORT—PHASE II REPORT, July 25, 1986, at 174 [hereinafter PHASE II REPORT] (available from the Alaska Legislative Affairs Agency, Reference Library, P.O. Box Y, Juneau, Alaska 99811). See generally R. Rodgers, *R.S. 2477 Controversy Heats Up*, THE NORTHERN LINE 1 (Nov.-Dec. 1984) (available from the Northern Alaska Environmental Center, 218 Driveway, Fairbanks, Alaska 99701).

15. See generally C. NASKE, *PAVING ALASKA'S TRAILS* (1986).

16. PHASE II REPORT, *supra* note 14, at 174 (quoting Gary Gustafson, then Chief, Land Management Division, Alaska Dept. of Natural Resources, Division of Land and Water

trails once crossed unreserved federal lands.<sup>17</sup> Now they cross state lands, private homesteads, Native lands, and national parks, preserves, monuments and wildlife refuges.

R.S. 2477 has new importance because of its effect on FLPMA, on the Alaska Native Claims Settlement Act (ANCSA), and on the Alaska National Interest Lands Conservation Act (ANILCA). Although FLPMA repealed R.S. 2477, preexisting R.S. 2477 rights-of-way will disqualify areas from identification as roadless areas under FLPMA.

Prompt validation of R.S. 2477 claims is essential because it becomes harder to prove that a highway was established as more time passes from the actual right-of-way acceptance. Additionally, prompt action on claims is necessary because those opposed to public access become more entrenched as land use policies change. For example, R.S. 2477 is seen by resource development advocates as a vital source of surface access because they consider later access statutes, particularly ANILCA, to be burdensome.<sup>18</sup> Conversely, environmental groups fear that widespread recognition of R.S. 2477 rights-of-way would damage ANILCA conservation units.<sup>19</sup> Native groups believe R.S. 2477 does not apply to ANCSA lands. Some of these groups fear that public trespass and damage, as well as liability and maintenance responsibility for the right-of-way, will result from public access. Other Native groups plan to use R.S. 2477 highways to cross ANILCA conservation units to facilitate resource development or to maintain subsistence hunting.<sup>20</sup> Some private landholders view R.S. 2477 as the key to surface transportation for recreation, agriculture, timber and hunting.<sup>21</sup>

---

Management).

17. See *infra* text accompanying note 105.

18. PHASE II REPORT, *supra* note 14, at 6-7. See generally Quarles & Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands: You Can Get There From Here*, 4 ALASKA L. REV. 1 (1987) (discussing ANILCA §§ 1110(b) and 1323); see also the companion article, *You Can Get There From Here: The Alaska Lands Act's Innovation in the Law of Access Across Federal Lands & Water*, 22 LAND & WATER L. REV. 347 (1987); 1 CONGRESS OF THE UNITED STATES, OFFICE OF TECHNOLOGY ASSESSMENT, ANALYSIS OF LAWS GOVERNING ACCESS ACROSS FEDERAL LANDS: OPTIONS FOR ACCESS IN ALASKA (1979) (an analysis without regard to R.S. 2477); 3 AM. L. OF MINING § 73.01 (2)(a) (2d ed. 1984).

19. PHASE II REPORT, *supra* note 14, at 7.

20. PHASE II REPORT, *supra* note 14, at 7.

21. PHASE II REPORT, *supra* note 14, at 8.

## II. CONFLICT BETWEEN NINETEENTH CENTURY RIGHT-OF-WAY POLICY AND TWENTIETH CENTURY PUBLIC LAND STATUTES

### A. *Section 603 of FLPMA and Section 2(c) of the Wilderness Act*

Outside of Alaska, the validity of rights-of-way asserted under R.S. 2477 is critical. Beyond its basic planning and inventory requirements, section 603<sup>22</sup> of the FLPMA directs the Secretary of Interior to review and identify those areas of the public lands which meet the wilderness criteria in section 2(c) of the Wilderness Act.<sup>23</sup> Under this system, roadless areas of at least 5,000 acres meeting the wilderness standards are studied for inclusion in the National Wilderness Preservation System. After identification, the areas are managed under a standard of nonimpairment to protect their suitability for wilderness preservation, subject to the continuation of existing mining and grazing uses; this phase continues until Congress determines whether the lands should be placed in the wilderness system.<sup>24</sup>

The term "roadless" as used in the FLPMA can be important. An area containing a constructed R.S. 2477 right-of-way is not roadless under section 603 of the FLPMA<sup>25</sup> because it does not meet the House Report definition of roadless.<sup>26</sup> If "construction" under R.S. 2477 is interpreted to mean "improved and maintained by mechanical means," the statute can be read consistently with section 603 of the FLPMA.<sup>27</sup> Deputy Solicitor Ferguson posits an addi-

---

22. 43 U.S.C. § 1782 (1982).

23. 16 U.S.C. § 1131(c) (1982). Solicitor's Opinion M-36910 (Supp.), 88 Interior Dec. 909, 910 (1981); *see generally* Humboldt County, Nevada v. United States, 684 F.2d 1276, 1283 (9th Cir. 1982).

24. 43 U.S.C. § 1782(c) (1982); Havlah Group, 88 Interior Dec. 1115, 1119 (1981). *See also* Humboldt County, 684 F.2d at 1282 (BLM has the authority to close area). *See generally* Solicitor's Opinion M-36910, 86 Interior Dec. 89, 109-111 (1979); Edward A. Nickoli, 90 I.B.L.A. 273, 276 (1986) (Iditarod Trail). R.S. 2477 rights-of-way are not equivalent to ANCSA § 17(b) easements through Native conveyances.

25. Letter from F. Ferguson, Deputy Solicitor of the Interior, to J. Moorman, Assistant Attorney General, Apr. 28, 1980; *distinguished in* Alaska Department of Transportation, 88 I.B.L.A. 106, 109 (1985) (opinion offers no basis in that appeal). *See generally* Humboldt County, 684 F.2d at 1284 ("roadless" must be raised at the administrative level) (citing BLM's Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72014, 72034 App. F. (1979)).

26. "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." Ferguson, *supra* note 25, at 11 (quoting Solicitor's Opinion M-36910, 86 Interior Dec. 89, 95 (1979), *modified*, 88 Interior Dec. 909 (1981) (citing H.R. REP. NO. 1163, 94th Cong., 2d Sess. 17 (1976))).

27. Ferguson, *supra* note 25, at 12 n.10 (citing H.R. REP. NO. 1163, 94th Cong., 2d Sess. at 17) (the House Committee identified no conflict); Transcript of Proceedings, Subcom-

tional reason for reading the two statutes consistently. He maintains that if statutes that create a section line easement for highway construction, like some Alaska statutes, perfected R.S. 2477 grants, the "bizarre result" would be that no roadless areas over 640 acres would exist and the entire state of Alaska would be exempted from section 603 of the FLPMA.<sup>28</sup>

However, the fallacy of Deputy Solicitor Ferguson's position lies in its assumption that map protraction lines are actually surveyed section lines. True section lines do not exist until a survey is performed.<sup>29</sup> Protraction is simply a process of subdividing a tract on a plat or map without monumenting the corners by an original field survey. The resulting diagram represents the "plan for extension of the rectangular system over unsurveyed lands, based upon computed values for the corner positions."<sup>30</sup> Unlike most other states, Alaskan section lines shown on U.S. Geologic Survey topographic maps are only lines of ink, not lines of survey.<sup>31</sup>

The vast majority of Alaska is unsurveyed, and will remain so well into the next century. BLM, which surveys public lands,<sup>32</sup> plans to complete exterior boundary surveys of Native land selections by 1990. Surveys of state land selections are not expected to be completed until 2005. Afterwards, the tens of thousands of Native allotments, cemetery sites, mineral claims, and so forth must be sur-

mittee on Public Lands of House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33 (Congressman Sam Steiger (R. Az.) distinguished between a "way" and a "road."); 86 Interior Dec. 89, 95 nn.10 & 11 (1979).

28. Section 603 requires a roadless area of 5,000 acres minimum to be considered for wilderness area designation. Ferguson, *supra* note 25, at 12.

29. P. Beckley, Chief, Branch of Lands and Minerals, BLM Alaska Office, Report on 44 LD 513, RS 2477 and Section Line Easements In Alaska, (Oct. 1977), § 1 (reviewed by a USDI Solicitor). *Contra Section Line Dedications for Construction of Highways*, 1969 Op. Alaska Att'y Gen. 7 n.15, 8 ALASKA L.J. 35, 36 n.15 (1970) (section line easements exist, attaching to the protracted section lines upon official survey, a floating easement). See also Sedwick, *supra* note 13, at 7-9 (private entry before actual survey would preclude the easement).

30. USDI, *Manual of Surveying Instructions 1973*, BLM TECHNICAL BULLETIN 6, § 2-14, at 17 [hereinafter *Manual of Surveying Instructions 1973*].

31. Sources for the cadastral survey land line grid are cited by USGS in the lower left-hand corner of the map sheet, along with any color codings used to differentiate between survey and protraction. *E.g.*, USGS, Skagway, Alaska-Canada (N5900-W13500/60x180) (1961, minor revisions 1973).

32. 43 U.S.C. § 2 (1982) (R.S. § 453; derived from the Acts of Apr. 25, 1812, ch. 68, § 1, 2 Stat. 716; July 4, 1836, ch. 352, § 1, 5 Stat. 107; June 6, 1874, ch. 223, 18 Stat. 62; Feb. 18, 1875, ch. 80, § 1, 18 Stat. 317; the Secretary of the Interior performs the surveying and sale of the public lands); *Manual of Surveying Instructions 1973*, *supra* note 30, § 1-19, at 8 (Order No. 2225, July 15, 1946, by the Secretary of the Interior placed the field surveying service under the Director of the Bureau of Land Management).

veyed.<sup>33</sup> No conflict exists between protracted survey lines and section 603 for various reasons. First, an easement does not attach to a section line until the plat is approved. Second, federal surveys will be accomplished after the repeal of R.S. 2477. Third, federal lands are not subject to the state's section line easement law.

In 1976 most BLM lands in Alaska possessed wilderness characteristics.<sup>34</sup> However, BLM deferred a wilderness inventory in Alaska pending the enactment of comprehensive Alaska lands legislation in 1980.<sup>35</sup> Section 1320 of the Alaska National Interest Lands Conservation Act (ANILCA)<sup>36</sup> removed Alaska from the wilderness review provisions of section 603 of FLPMA.<sup>37</sup> Hence, section 603 was never implemented in Alaska. This result created by section 1320 of ANILCA negates Deputy Solicitor Ferguson's argument that section line easements would eliminate the entire State of Alaska from section 603 review.<sup>38</sup>

#### B. *Alaska National Interest Lands Conservation Act*

ANILCA<sup>39</sup> requires publication of general management plans for 124 million acres of Alaska. The land affected is made up of national parks, preserves, wildlife refuges, forests, wild and scenic rivers and other conservation units.<sup>40</sup> Because ANILCA's requirements for establishing transportation corridors are stringent, there is widespread interest in identifying R.S. 2477 rights-of-way to preserve secure access through federal land holdings.<sup>41</sup>

ANILCA placed many potential R.S. 2477 mining roads and winter trails within conservation units but did not authorize the Secretary of Interior to require a permit for travel over an existing R.S. 2477 right-of-way.<sup>42</sup> However, in *United States v. Vogler*,<sup>43</sup> the court ruled that the U.S. Park Service possessed the power to regu-

---

33. U.S. GAO, REPORT TO SECRETARY OF USDI, ALASKA LAND CONVEYANCE PROGRAM—A SLOW, COMPLEX, AND COSTLY PROCESS (June 12, 1984).

34. 3 AM. L. MINING § 71.02(2)(b)(iv) (2d ed. 1984).

35. *Id.*

36. 43 U.S.C. § 1784 (1980).

37. *Id.* See 3 AM. L. OF MINING § 71.02 (3)(a)(ii) (2d ed. 1984).

38. See *supra* text accompanying note 28.

39. Pub. L. No. 96-487, 94 Stat. 2371, 2371-2551, 16 U.S.C. §§ 3101, 3101-3233 (U.S. GPO 1982 & Supp. I 1983 & Supp. III 1985).

40. PHASE II REPORT, *supra* note 14, at 2.

41. PHASE II REPORT, *supra* note 14, at 2.

42. *Vogler*, No. A84-289 Civ. 40 (D. Alaska Jan. 5, 1987), *aff'd*, No. 87-3798, slip op. (9th Cir. Sept. 28, 1988) (transcript of oral memorandum decision and order).

43. *Id.*



late off-road vehicles on an R.S. 2477 right-of-way in a national preserve. The court found that the broad power under the National Park Service Organic Act<sup>44</sup> includes the right to control uses across rights-of-way.<sup>45</sup> This ruling enables USDI to regulate an existing right-of-way under R.S. 2477 within at least the national park system.<sup>46</sup>

### C. *The Congressional Right-of-Way Offer*

Beyond the actual language of the statute, Congress' original intent in enacting section 8 is unclear because no legislative history referred to R.S. 2477.<sup>47</sup> However, federal courts have held that R.S. 2477 was part of a federal statute which "addressed solely mining and homesteading claims" intended by Congress "to facilitate private mineral development."<sup>48</sup> However, in 1891 the South Dakota Supreme Court found a somewhat broader purpose for R.S. 2477. The court said that R.S. 2477 allows highway construction without tres-

---

44. 16 U.S.C. §§ 1-3 (1982).

45. *Vogler*, No. A84-289 Civ. at 40-41 (citing *Wilkenson v. Department of the Interior*, 634 F. Supp. 1265, 1279 (D. Colo. 1986) (federal government retained the right to control certain uses across the right-of-way); *Robbins v. United States*, 284 F. 39 (8th Cir. 1922) (valid exercise of control over property); *accord Kleppe v. New Mexico*, 426 U.S. 529, *reh'g denied*, 429 U.S. 873 (1976) (broad delegation of authority to the Secretary); *distinguishing Colorado v. Toll*, 268 U.S. 228 (1929) (roads were built by counties and the state pursuant to R.S. 2477 prior to the creation of the National Park)).

46. *Vogler*, No. A84-289 Civ. at 42-43 (citing *Wilkenson*, 634 F. Supp. at 1276) (government imposition of user fee for public transportation use invalidated).

47. *Ferguson*, *supra* note 25, at 1 (citing THE CONGRESSIONAL GLOBE, Vol. 36, 39th Cong., 1st Sess. (1866); Leshy, *Wilderness And Its Discontents—Wilderness Review Comes to the Public Lands*, ARIZ. ST. L.J. 361, 436 n.381 (1981); Lonergan, *Access to Intermingled Mineral Deposits, Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands*, 8 LAND & WATER L. REV. 125, 127 (1973). *See generally* Biddle, *Access Rights Over Public Lands Granted by the 1866 Mining Law And Recent Regulations*, 18 ROCKY MTN. MIN. L. INST. 415, 417-21 (1973) (mining laws premised on reasonable access to the public lands); *Limitation of Access to Through-Highways Crossing Public Lands*, Solicitor's Opinion, 62 Interior Dec. 158, 161 (1955) (unequivocal grant without limitation as to the manner of right-of-way establishment (citing *Smith v. Mitchell*, 58 Pac. 667 (Wash. 1899))).

48. *Vogler*, No. A84-289 Civ. at 24 (quoting *Humboldt County*, 684 F.2d at 1281-82). *But cf.* *United States v. Gates of the Mountains Lakeshore Homes, Inc.*, 565 F. Supp. 788, 795 (D. Mont. 1983), *rev'd*, 732 F.2d 1411, 1413 (9th Cir. 1984); *McIntyre v. United States*, 568 F. Supp. 1, 3 (D. Alaska 1983) (distinguishing *Humboldt County* on the basis of plaintiffs' standing). *See generally Wilkenson*, 634 F. Supp. at 1275 (purpose of the statute was to encourage expansion, exploitation and development); Biddle, *supra* note 47, at 427 (public access under R.S. 2477 distinguished from private mining access; federal government sanctioned private development); Neff, *The Miners Law*, 19 IDAHO L. REV. 577, 585 (1983) (federal law is based upon the local customs or rules of the miners in the several districts); Rippley, *Highway Rights-of-Way on Public Lands*, 9 TRANSP. L.J. 121 (1977).

pass liability. The court also held that section line highways attached upon survey and took effect upon the date of applicable territorial acceptance.<sup>49</sup> R.S. 2477 is typical of the laws passed during an era when Congress sought to encourage expansion and development of the public domain with minimal federal supervision.<sup>50</sup>

The Act requires that the federal right-of-way grant be "accepted."<sup>51</sup> The grant can be "accepted by action of appropriate public officials [requiring] no approval by the administering federal agency."<sup>52</sup> Thus the USDI has no authority to invalidate R.S. 2477 right-of-way grants made by Congress directly to the public.<sup>53</sup> However, the validity of a claimed right-of-way may be challenged in

---

49. Annotation, *Necessity and Sufficiency of Acceptance of Grant of Right of Way Over Public Land for Public Highway*, 1917A L.R.A. 355-56 (citing *Wells v. Pennington County*, 2 S.D. 1, 39 Am. St. Rep. 758, 48 N.W. 305 (1891) (territorial law declaring section lines public highways)). Compare *Douglas County, Washington*, 26 Pub. Lands Dec. 446, 447 (1898) (county cannot attach right-of-way to section lines in advance of an apparent necessity).

50. E.g., President Andrew Johnson ratified the Treaty Concerning the Cession of the Russian Possessions in North America ten months later on June 20, 1867, purchasing Alaska from Russia. Treaty Concerning the Cession of Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of America, March 30, 1867, United States-Russia, 15 Stat. 539, T.I.A.S. No. 301. See generally *Gates & Swenson*, History of Public Land Law Development 716-21 (Nov. 1968) (an interesting review of the politics and politicians responsible for the passage of the Act).

51. *Clark v. Taylor*, 9 Alaska 298, 305 (1938) (acceptance by public sufficient); *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961) (positive act by public body or sufficient public user required); See ALASKA STAT. § 19.10.010 (1981) (originally passed as 1951 Alaska Sess. Laws 123, based upon prior legislation approved Apr. 6, 1923; has been interpreted by the Alaskan courts as an acceptance for section line easements). See generally *Sedwick*, *supra* note 13, at 16-17 (state trust lands must be excluded from ALASKA STAT. § 19.10.010 (1981)). Cf. *Schulenberg v. Harriman*, 88 U.S. (21 Wall.) 44 (1874) (railroad grant is *in praesenti*; grant accepted upon railroads performance) distinguished in *Tahdooahnippah v. Thimmig*, 481 F.2d 438, 440 (10th Cir. 1973) (on the basis that the grant in *Schulenberg* did not contain a provision requiring express acceptance of conditions). Compare BLM Manual, § 2801(B) (Rel. 2-229 6/30/86) ("constructed and accepted") with BLM Manual, § 2801(B) (Rel. 2-152 9/10/82) ("definitely established in one of the ways authorized by the laws of the state where the land is located"). See also 120 CONG. REC. 22,284 (July 8, 1974) (user or positive act sufficient to show public intent). See generally *Rippley*, *supra* note 48, at 123.

52. *T. Bingham*, RS 2477 (Dec. 20, 1985) at 8 (available from USDI, BLM, Chief, Division of Rights-of-Way, Wash., D.C., file 2800 (330)). See *Wilderness Society v. Morton*, 479 F.2d 842, 882 n.90 (D.C. Cir. 1973) (en banc), cert. denied, 411 U.S. 917 (1973), appeal after remand, 495 F.2d 1026 (D.C. Cir. 1974) (R.S. 2477 is a present grant, normally no right-of-way application is required).

53. *Edward A. Nickoli*, 90 I.B.L.A. at 275 ("determining the validity of an R.S. 2477 trail is generally beyond the jurisdiction of BLM"); Cf. *Northway Natives, Inc.*, 88 Interior Dec. 14, 19 (1981) (citing amended S.O. 3029, 45 Fed. Reg. 1692, 1693 (1980), BLM does not determine validity of R.S. 2477 in the first instance); *Leo Titus, Sr.*, 92 Interior Dec. 578, 588 (1985) (not adjudicated by BLM).

This is the basis of BLM's refusal to note claimed R.S. 2477 rights-of-way on Master Title Plats (MTP's), discussed below.

federal or state courts. State court adjudication of rights-of-way depends upon the ownership of the land, the parties involved, and the issues to be decided.<sup>54</sup> In right-of-way conflicts between the patentee and grantee, the burden of proof is "placed on the party attempting to show the existence of an R.S. 2477 right-of-way by clear and convincing evidence."<sup>55</sup>

No central system for acceptances existed at the time relevant patents and other documents conveying public lands were created. Hence, it was impracticable to include a specific R.S. 2477 right-of-way in the reservations or exceptions they contained. A federal patent is therefore subject to any valid, existing R.S. 2477 grant.<sup>56</sup>

#### D. *State-Federal Administrative Procedures for Identification and Notation on Federal Land Management Records*

On September 28, 1984, the Fairbanks, Alaska, District Office of the BLM entered into a Memorandum of Understanding (MOU) with the Northern Region Offices of the Alaska Department of Natural Resources and the Alaska Department of Transportation and Public Facilities. The MOU established procedures to handle as-

54. M. Penfold, BLM State Director for Alaska, *R.S. 2477—The BLM Viewpoint*, an issue paper presented to the Alaska Bar Association, Natural Resources Law Section Meeting, in Sitka, Alaska, on May 17, 1985, at 1. Nick DiRe, 55 I.B.L.A. 151, 154 (1981) (determining validity of public highway under R.S. 2477 is a matter for state courts). *Edward A. Nickoli*, 90 I.B.L.A. at 275 (BLM has no jurisdiction to determine validity of R.S. 2477) (citing Alfred E. Koenig, A-30139 [a looseleaf Pub. Lands Dec. available from USDI] (Nov. 25, 1964) (state courts are the proper forum)). *See also* Blue Mesa Road Association, 89 I.B.L.A. 120, 125 n.3 (1985) ("As a general rule, a determination of the existence of a R.S. § 2477 right-of-way will not be made by the Department."); *Wason Toll Road Co. v. Creede Townsite*, 22 Pub. Lands Dec. 145, 146 (1896) (state court, after title had passed from the nation, had full power to settle); Bingham, *supra* note 52, at 8; Biddle, *supra* note 47, at 427-28. BLM Instruction Memorandum No. 84-326, Administration of Right-of-way Grants on Lands Patented (Mar. 12, 1984, expired Sept. 30, 1985).

This issue is currently being litigated in *Alaska Greenhouses*, No. A-85-630.

55. *Murray v. O'Brien*, No. 4FA-85-609 Civ., slip op. at 6 (Alaska Super. Ct. July 9, 1986) (the court determined that plaintiff had met his burden of proof establishing that the O'Connor Trail qualifies as an R.S. 2477 highway).

56. *Vogler*, No. A84-289 Civ. at 42-43; *The Pasadena & Mt. Wilson Toll Road Co. v. Schneider*, 31 Pub. Lands Dec. 405, 408 (1902) (R.S. 2477 is a general statute and no reservation of an easement claimed thereunder is necessary). Bingham, *supra* note 52, at 8; Rippley, *supra* note 48, at 122. *Cf. Douglas County, Washington*, 26 Pub. Lands Dec. at 447 (those acquiring lands take them subject to any easement existing by authority of law).

*Contra Alaska Dept. of Transp.*, 88 I.B.L.A. at 110 (the board required BLM to expressly provide in the grant of an ANCSA § 17(b)(3) easement that it was subject to an R.S. 2477 claim by the State of Alaska "if valid"); *Leo Titus, Sr.*, 92 Interior Dec. at 587-88 (citing *Alaska* as an exception to the rule prohibiting identification in issued patents for ANCSA 17 (b) easements); *See generally* *Edward A. Nickoli*, 90 I.B.L.A. at 275 (BLM decision to condition patent as "subject to the continued right of public access" was affirmed).

served R.S. 2477 rights.<sup>57</sup> Under the MOU, BLM agreed to use the State of Alaska's information to note its records. However, until the state demonstrates to BLM's satisfaction the existence of an R.S. 2477 right-of-way, BLM will manage the public lands as if no right-of-way exists. Additionally, BLM may authorize other uses within the right-of-way.<sup>58</sup> Delay in identification of valid R.S. 2477 claims will produce litigation when opposing claims arise. The litigation will harm the public by creating expense and a possible loss of access route use.<sup>59</sup>

Although a congressional grant requires no administrative acceptance by the USDI, the BLM Manual does allow notation of R.S. 2477 claims on official BLM records for administrative purposes.<sup>60</sup> This notation is at the heart of the R.S. 2477 agreement. However, due to divergent state and federal positions, the agreement has failed to provide an efficient process for placing right-of-way claims in the public record.<sup>61</sup>

A workable federal-state agreement for notation on BLM land records is essential for the orderly, uniform processing of R.S. 2477 claims in conjunction with the time constraints of other federal land

---

57. Penfold, *supra* note 54, at 2. See Defendant's Memorandum in Support of Motion for Summary Judgment at 2; Vogler, No. A84-289 Civ. (the Bielenberg (sometimes "Bulenberg") Trail from Circle Hot Springs to Woodchopper in Alaska is the first trail to come within the procedures of the MOU and is the trail utilized by Vogler); See also Ferguson, *supra* note 25 (this opinion reflects a change in USDI's position); Bingham, *supra* note 52.

58. Penfold, *supra* note 54, at 2. State Director Penfold stated that some of the issues which must be addressed by the State of Alaska include: (1) Is the State going to take a leadership role in identifying potential R.S. 2477 rights? (2) What provisions will the state make for the abandonment of R.S. 2477's and what procedures must be followed to secure a determination of abandonment? (3) What sort of management will the non-federal entity (state, local government or individual) apply to the "right-of-way"? (4) Is the state going to develop policies and procedures for developing, maintaining, upgrading, and the like, for the claimed R.S. 2477 rights? The Commissioners of the Alaska Departments of Natural Resources and of Transportation and Public Facilities presented Alaska Governor Cowper with a draft policy paper, dated Jan. 26, 1987, addressing these issues. This policy paper has not yet been adopted. Hawkins, RS 2477—Building On Experience, Technical Proceedings at 123, 23rd Annual Alaska Surveying and Mapping Conference (Feb. 8-12, 1988).

59. See generally *infra* note 76 and accompanying text.

60. 43 C.F.R. § 2802.5 (1986) Special application procedures; BLM Manual, § 2801 (B)(3) (Rel. 2-229 6/30/86) (Documenting RS 2477 Grants).

61. Letter from Ron Swanson, Manager, Interest Determinations, Alaska Department of Natural Resources, Division of Land and Water Management, to Leroy Latta (Feb. 19, 1987) (discussing the current status of R.S. 2477 policy); letter from Norman Piispanen, Urban Planner, Alaska Department of Transportation and Public Facilities, Northern Region Planning, to Leroy Latta, Jr. (Feb. 11, 1987) (MOU followed for a couple of years with mixed results, though never rescinded it lays dormant due to lack of funding); Hawkins, *supra* note 58, at 123.

management statutes. On the other hand, continued inertia<sup>62</sup> will result in costly private litigation of 1,400 possible rights-of-way.

### E. *BLM Administration of R.S. 2477*

BLM's present regulations allow the filing of a location map depicting highways constructed under R.S. 2477.<sup>63</sup> A public R.S. 2477 right-of-way is like a private miner's claim located under the Mining Law of 1872, for which one need not apply.<sup>64</sup> Federal land managers may challenge the validity of a private mining claim where the claimant fails to meet the 1872 Act's requirements of "locating a valuable mineral deposit."<sup>65</sup> Similarly, a claimed R.S. 2477 public right-of-way may also be invalidated by failure to establish the right-of-way by clear and convincing evidence.<sup>66</sup>

In the past, BLM did not evaluate a claimed R.S. 2477 right-of-way for validity where there was no land or resource management conflict. Conflicts rarely arose between the existence of claimed rights-of-way under R.S. 2477 and BLM public land management goals.<sup>67</sup> However, statutes such as FLPMA require more active resource management from BLM. For example, in carrying out FLPMA's directive to review the public lands for wilderness values, BLM must assess the validity of right-of-way claims under R.S. 2477.<sup>68</sup>

62. *E.g.*, the USDI policy paper, *supra* note 10, is still awaiting approval by the BLM Washington Office for public distribution. Letter from Ms. Sue Wolf, Chief, Branch of Land Resources, USDI, BLM, Alaska State Office to Leroy K. Latta (Nov. 16, 1987).

63. BLM Manual, § 2801 (B)(2) (Rel. 2-229 6/30/86); Bingham, *supra* note 52, at 7 ("The submission of such maps showing the location of R.S. 2477 highway(s) on the public lands shall not be conclusive evidence as to show the location . . . [and] shall not preclude a later finding as to their existence."). See 43 C.F.R. 2802.5(b) (1986).

64. Biddle, *supra* note 47, at 423-435 (citing Rights of Mining Claimants to Access Over Public Lands to their Claims, 66 Interior Dec. 361 (1959) and Alfred E. Koenig, 4 I.B.L.A. 18 (1971) (mining roads are not R.S. 2477 roads)); Bingham, *supra* note 52, at 7; Ferguson, *supra* note 25, at 10. See John V. Hyrup, 15 I.B.L.A. 412, 420 (1974) (the 1866 Act was self-executing and required no departmental approval of an application); *Northway Natives, Inc.*, 88 Interior Dec. at 19 (citing amended S.O. 3029).

*Contra Alaska Department of Transportation*, 88 I.B.L.A. 106 (under ANCSA § 22(c) and R.S. 2477 mining claims are treated differently).

65. *Cameron v. United States*, 252 U.S. 450, 459 (1920) (decision by Secretary of Interior to reject is conclusive as to invalidity of claim); *United States v. Coleman*, 390 U.S. 599, 602 (quartzite not a valuable mineral deposit), *reh'g denied*, 391 U.S. 961 (1968); *Hickel v. Oil Shale Corp.*, 400 U.S. 48, 57 (1970) (Dept. of Interior had subject matter jurisdiction).

66. Bingham, *supra* note 52, at 7; Ferguson, *supra* note 25, at 10.

67. Bingham, *supra* note 52, at 7.

68. Bingham, *supra* note 52, at 7; *Nick DiRe*, 55 I.B.L.A. at 154 (FLPMA review); *Blue Mesa Road Association*, 89 I.B.L.A. at 125 n.3 (citing *Nick DiRe* and *Homer D. Meeds*, 83 Interior Dec. 315 (1976)).

USDI is required to prepare and maintain inventories<sup>69</sup> of the public lands and to prepare land use plans.<sup>70</sup> Officially, BLM encourages both state and local governments to assert R.S. 2477 claims.<sup>71</sup> However, USDI refuses to accept Alaska's submittals because it views them as unsatisfactory. FLPMA authorizes BLM to note R.S. 2477 rights-of-way claims across lands it manages on its official records for administrative and planning purposes only.<sup>72</sup> BLM will note in its records where these claims are highways constructed on public lands.<sup>73</sup> Although notation does not validate a claim, BLM will not note its records if it views the claim as invalid. Further, BLM will adjudicate asserted claims only if "there is a conflicting land or resource management concern that cannot be resolved without determining the validity of the R.S. 2477 assertion."<sup>74</sup> BLM's refusal to note the potential validity of claims, in a context of supposed neutrality, or by making a simple notation of a claim, amounts to an adjudication of invalidity without a hearing.

On April 8, 1974, the State of Alaska, Department of Highways, presented BLM with its claimed inventory of roads and trails under R.S. 2477. However, BLM refused to note the trails because the inventory was "not sufficient for administratively processing the claims."<sup>75</sup> Although in effect this refusal defeated the claims of historic use, the impetus for the act was probably "administrative efficiency,"<sup>76</sup> or a desire to close files and reduce case loads by foreclosing rather than adjudicating and denying claims. Such a practice is supported neither by statute nor by case law.

---

69. FLPMA § 201, 43 U.S.C. § 1711(a) (1982).

70. FLPMA § 202, 43 U.S.C. § 1712(a) (1982).

71. BLM Manual, § 2801(B) (Rel. 2-229 6/30/86).

72. 43 U.S.C. §§ 1711(a), 1712 (1982); 43 C.F.R. § 2802.5 (1985). *See generally* Right-of-Way Grants Issued On or Before October 21, 1976, 43 C.F.R. § 2801.4 (1986).

73. Bingham, *supra* note 52, at 7 (this is similar to the "acceptance" and noting of a mining claim notice filed pursuant to FLPMA § 314, 43 U.S.C. § 1744 (1982)).

74. Bingham, *supra* note 52, at 8. *Accord* letter from P. Daniel Smith, Acting Assistant Secretary for Fish and Wildlife and Parks to Ms. Dianne Holmes (Jan. 9, 1986); *Leo Titus, Sr.*, 92 Interior Dec. at 588 (entirely factual determination, controlled entirely by the claimant's intent and conduct).

75. Hempel, *supra* note 10, at 9-10.

76. *Leo Titus, Sr.*, 92 Interior Dec. at 588 ("to avoid difficult decision making where there is no real point in making the effort . . ."); State of Alaska, Department of Transportation and Public Facilities, 89 Interior Dec. 346, 348 (1982) ("administrative burden of discovering and listing").

### F. *Prospective Application of R.S. 2477 Until Its Repeal by FLPMA*

The Ninth Circuit has stated that the purpose of section 8 was to cure existing public land trespass. R.S. 2477 was "not intended to grant rights, but instead to give legitimacy to an existing status otherwise indefensible."<sup>77</sup> Although it made no specific comments on R.S. 2477, the United States Supreme Court acknowledged that the broad purpose of the 1866 Act was to cure prior trespasses on the public domain.<sup>78</sup> Later, the Court said that R.S. 2477 was "so far as then existing roads are concerned, a voluntary recognition and confirmation of preexisting rights, brought into being with the acquiescence and encouragement of the general government."<sup>79</sup> However, the USDI and the courts have also applied the law to highways constructed after 1866.<sup>80</sup> The statute can be read as looking forward as well as backward in time<sup>81</sup> and therefore applies to offer acceptances made before its repeal by FLPMA.

## III. RIGHT-OF-WAY VALIDITY AS A QUESTION OF STATE LAW

### A. *Application of State Law*

State court, as well as most Interior Board of Land Appeals (IBLA) decisions construing R.S. 2477, defer to local usage and cus-

---

77. *United States v. Dunn*, 478 F.2d 443, 445 n.2 (9th Cir. 1973) (protecting prior encroachers) (relying on *Jennison v. Kirk*, 98 U.S. (8 Otto) 453, 459-61 (1878) (government obligation to respect private rights); and *Central Pacific Ry. Co. v. Alameda County*, 284 U.S. 463 (1932) (recognition of preexisting right of possession)). *But see* *United States v. Clarke*, 529 F.2d 984, 986 (9th Cir. 1976), *appeal denied*, 590 F.2d 765 (9th Cir. 1979), *rev'd*, 445 U.S. 253 (1980) (easement of necessity on private land); *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1413 n.3 (*Dunn* questionable authority for merely retrospective application of statute). *Ferguson*, *supra* note 25, at 3. *Rippley*, *supra* note 48, at 125.

78. *Jennison*, 98 U.S. at 457-61 (in dictum concerned § 9 of the 1866 Act, R.S. 2339, rights-of-way for ditches and water canals for mining). *See also* *Broder v. Water Company*, 101 U.S. (11 Otto) 274, 275 (1879) (interpreting § 9 to the same effect). *Ferguson*, *supra* note 25, at 3.

79. *Central Pacific Ry. Co.*, 284 U.S. at 473, involved R.S. 2477, but only the validity of roads constructed prior to 1866.

80. *Wilderness Society*, 479 F.2d at 882-83 (Trans-Alaska Pipeline Haul Road established in 1970, now the James Dalton Highway); *Penasco Valley Telephone Cooperative, Inc.*, 55 I.B.L.A. 360, 362 (1981) (county roads established between 1959 and 1969); *Mountain Bell*, 83 I.B.L.A. 67, 68 (1984) (state highway established in early 1900's); *Mountain States Telephone & Telegraph Co.*, 84 I.B.L.A. 1, 2 (1984) (state highway designated in 1887); *Leo Titus, Sr.*, 92 Interior Dec. at 585 (Dunbar-Livengood (Brooks) Trail existed as early as 1921).

*Contra Dunn*, 478 F.2d at 444 n.2 (questioned by *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1411).

81. *Humboldt County*, 684 F.2d at 1282 n.6. *Ferguson*, *supra* note 25, at 4.

tom to determine the validity of a claimed right-of-way. This practice results in inconsistent rulings.<sup>82</sup> Mining law developed in a similar manner. As part of the first national mining law, the purpose of R.S. 2477 was, like other parts of the statute, to encourage economic development of unsettled lands where the federal land manager was seldom present. The federal government now contends that the validity of an R.S. 2477 right-of-way claim is a federal question<sup>83</sup> and that state court decisions are not binding where the United States was not a party.<sup>84</sup> However, the IBLA adjudicates claims involving the federal government. With few exceptions, its decisions have followed state law.

### B. *Right-of-Way Creation by Public Use*

The federal government also contends that the public may not establish an R.S. 2477 right-of-way because "public user"<sup>85</sup> is in the nature of adverse possession, which cannot be asserted against the government. The federal government would only recognize an R.S. 2477 right-of-way if there is both actual construction of a highway

---

82. See *infra* notes 91-94. Biddle, *supra* note 47, at 428. See also BLM Manual § 2801 (B) (Rel. 2-152 9/10/82, *repealed* 6/30/86) (definitely established in one of the ways authorized by the laws of the state where the land is located).

83. Ferguson, *supra* note 25, at 4. See also 73A C.J.S. *Public Lands* § 69 (1983). *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1413 (implied borrowing of state law which allowed transmission lines within rights-of-way superseded). This case is the basis for the change in DOI's position making federal law controlling but the case may be distinguished as a utility case.

The position of the U.S. Department of Justice is that state cases do not control the proper standard for establishment of an R.S. 2477 right-of-way; *Mountain Bell*, 83 I.B.L.A. at 69 (citing *Gates of the Mountains Lakeshore Homes* "question of Federal law"). Letter from Bruce M. Landon, Attorney, Land and Natural Resources Division, U.S. Department of Justice, to Leroy K. Latta (Mar. 3, 1987) (discussing *Vogler*).

*Contra* Biddle, *supra* note 47, at 427-28 (become public roads under state law, i.e., local custom); *Nick DiRe*, 55 I.B.L.A. at 152 (citing Limitation of Access to Through-Highways Crossing Public Lands, 62 Interior Dec. at 161 (established under local state laws)); *Homer D. Meeds*, 83 Interior Dec. at 320-21 (established in accordance with local state laws); *Leo Titus, Sr.*, 92 Interior Dec. at 586 (pursuant to law where land is located); *Wilderness Society*, 479 F.2d at 882 (acceptance is some positive act on the part of the appropriate public authorities of the state, clearly manifesting an intention to accept) (quoting *Hamerly*, 359 P.2d at 123); Annotation, *supra* note 49 (Congressional grant may be accepted by an act of state legislature); *Sierra Club v. Hodel*, 675 F. Supp. 594, 604 (D. Utah 1987), *aff'd*, 848 F.2d 1068 (10th Cir. 1988) ("established by public use under terms provided by state law").

84. Ferguson, *supra* note 25, at 1. *Contra Blue Mesa Road Association*, 89 I.B.L.A. at 125 n.3 (citing *Nick DiRe* as an exception to the general rule that a state court is the proper forum).

85. "User" refers to the "actual exercise or enjoyment of any right or property. . . ." BLACK'S LAW DICTIONARY 1383 (5th ed. 1979). *E.g.*, *McRose v. Bottyer*, 81 Cal. 122, 125, 22 P. 393, 394 (1889) (acceptance by user).



on public lands and public acceptance of the grant by authorized means.

Except as otherwise provided by the Color of Title Act of 1928, as amended,<sup>86</sup> the common law doctrine of adverse possession does not operate against lands where title is in the federal government.<sup>87</sup> However, the federal mining laws (of which R.S. 2477 is a part) recognize user rights over the public domain in the absence of a federal presence.<sup>88</sup>

The exact interplay between the concepts of user and adverse possession is unclear.<sup>89</sup> To gain an interest in federal land the grantee must comply with the federal statute granting such interest.<sup>90</sup> Thus, the question is whether, within the meaning of the statute, "user" is either "construction of highways" or a method of public acceptance of the grant.

### C. Statutory Interpretation

To determine whether a particular highway has been legally established under R.S. 2477, federal law must be interpreted.<sup>91</sup> Gen-

---

86. Dec. 22, 1928, ch. 47, § 1, 45 Stat. 1069; July 28, 1953, ch. 254, § 1, 67 Stat. 227; 43 U.S.C. § 1068 (1982).

87. *United States v. California*, 332 U.S. 19, 39-40 (oil and gas claims in the three-mile marginal belt; paramount rights of United States not lost by adverse possession), *reh'g denied*, 332 U.S. 787, *opinion supplemented*, 332 U.S. 804 (1947), *petition denied*, 334 U.S. 855 (1948); *Texas v. Louisiana*, 410 U.S. 702, 714 (boundary dispute; state may not acquire federal lands by prescription and acquiescence), *reh'g denied*, 411 U.S. 988 (1973). *See also* 2 C.J.S. *Adverse Possession* § 14 (1972 & Supp. 1986). *Cf. ALASKA STAT.* § 38.95.010 (1984) (passed in 1949, expressly prohibiting adverse possession against Alaska territorial lands, and later state lands). *See generally* *Kinscherff v. United States*, 586 F.2d 159, 160-61 (10th Cir. 1978) (members of the public, as such, do not have "title" in public roads so as to bring suit to quiet title to an alleged R.S. 2477 public highway); *Park County, Montana v. United States*, 626 F.2d 718, 720-21 (9th Cir. 1980) (twelve-year statute of limitations is a bar to local government claim to an R.S. 2477 right-of-way established in 1902 across Gallatin National Forest) (*distinguished by* *California ex rel. State Lands Comm'n v. United States*, 512 F. Supp. 36, 45 (N.D. Cal.) (public trust lands), *cert. denied*, 449 U.S. 1112 (1981); *Humboldt County*, 684 F.2d at 1280-81 (county's right-of-way claim barred by twelve-year statute of limitations).

88. *See generally* *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 512 (1874) (prior appropriation of water rights recognized).

89. *See generally* *Hayes v. Government of Virgin Islands*, 392 F. Supp. 48, 51 (D.V.I. 1975) (R.S. 2477 protects only trespassers; the Virgin Islands, like the Territory of Alaska, were under R.S. § 1891—all general laws applied).

90. *Bingham*, *supra* note 52, at 1. *Ferguson*, *supra* note 25, at 4. *See generally* Annotation, *supra* note 49.

91. It is worth noting that the Supreme Court held that § 9 of this Act (R.S. 2339) was superseded by later legislation providing for rights-of-way for electric power transmission. The Court remarked that "[o]bviously this legislation was primitive." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917). The Court also noted that the later legislation specif-

erally, grants by the federal government "must be construed favorable to the government and . . . nothing passes but what is conveyed in clear and explicit language—inferences being resolved not against but for the government while protecting the intent of the legislation."<sup>92</sup> This rule encompasses grants made to states, territories, and private parties.<sup>93</sup> The Ninth Circuit has noted that any doubts as to the scope of an R.S. 2477 grant "must be resolved in favor of the [federal] government."<sup>94</sup> The court rejected the argument that a grant must be construed according to state law. Thus, state law cannot expand the federal offer. Rather, Congress is assumed to have intended every word of a statute. Therefore, each word of the statute must be given force and effect.<sup>95</sup> R.S. 2477 has no legislative

---

ically dealt with the subject, covered it fully, provided new provisions, and evidently was designed to be complete in itself. A similar argument could be made with respect to R.S. 2477 and the highway, land management, environmental, and natural resource laws enacted since 1866. The Ninth Circuit relied upon *Utah Power & Light Co.*, 243 U.S. at 389, in *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1413 ("[w]e conclude that R.S. 2477 had been similarly superseded"). See also Rippley, *supra* note 48, at 124.

See generally *State v. Alaska Land Title Ass'n*, 667 P.2d 714 (Alaska 1983), *cert. denied*, 464 U.S. 1040 (1984); *John V. Hyrup*, 15 I.B.L.A. at 420 (§ 9 superseded by Act of May 11, 1898, ch. 292, § 1, 30 Stat. 404, 43 U.S.C. § 956 (1982), *repealed in part* by Pub. L. No. 94-579, 90 Stat. 2793).

92. *United States v. Denver & Rio Grande Railway Co.*, 150 U.S. 1, 14 (1893) (congressional grant intended to secure public advantages though quasi-public private enterprises should receive a more liberal construction in favor of its purpose). *Wisconsin Central Ry. Co. v. United States*, 164 U.S. 190, 202 (1896) (railroad contract; "statutes granting privileges or relinquishing rights of the public are to be strictly construed against the grantee"); *Caldwell v. United States*, 250 U.S. 14, 20 (1919) (grant of timber to railroad is not a grant of trees; "nothing passes but what is conveyed in clear and explicit language . . ."); *Great Northern Ry. Co. v. United States*, 315 U.S. 262, 272 (1942) ("a grant is to be resolved favorably to a sovereign grantor"); *Andrus v. Charleston Stone Products Co.*, 436 U.S. 604, 617 (1978) ("any doubts 'are resolved for the government'") (quoting *United States v. Union Pacific Ry. Co.*, 353 U.S. 112, 116 (1957)), *distinguished in* *Sheep v. United States*, 440 U.S. 668, 682-83 (1979) (but grants are not construed to defeat legislative intent).

93. *Dubuque & Pacific Ry. Co. v. Litchfield*, 64 U.S. (23 How.) 66, 88 (1859) (land grant in aid of Des Moines River navigation).

94. *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1413.

95. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("give effect, if possible, to every clause and word of a statute") (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882)); *Williams v. Sisseton-Wahpeton Sioux Tribal Council*, 387 F. Supp. 1194, 1200 (D. S. D. 1975) ("court must assume that the legislature meant every word of statute and that, therefore, every word and phrase must be given force and effect"). See also *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976) (statutes not construed to render certain provisions superfluous or insignificant); *Wilderness Society*, 479 F.2d at 856 (avoid surplusage); *United States v. Wong Kim Bo*, 466 F.2d 1298, 1306 (5th Cir.), *reh'g denied*, 472 F.2d 720, 722 (5th Cir. 1972) (accord substantial significance to agency interpretation of its own regulations); *Alaska v. Lyng*, 797 F.2d 1479, 1482 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 1603 (1987) (deference to administrative interpretation of a statute is appropriate whether or not it is embodied in a regulation); *Powell v. Tucson Air Museum Foundation of Pima*, 771 F.2d

history to suggest otherwise.<sup>96</sup>

R.S. 2477 does not specifically provide for the construction of the grant according to the law of the state (although mining law recognizes local custom as controlling). Rather, some federal courts have held that its scope is a question of federal law.<sup>97</sup> In cases where the federal government is a party, any doubt as to the scope of R.S. 2477 must be resolved "in the government's favor."<sup>98</sup> Here, it becomes important to show that the federal government was aware of the route and did not contest it. This makes the notation on BLM records important to private litigation.

#### IV. THE ELEMENTS OF R.S. 2477

To establish a valid R.S. 2477 highway grant, three elements must be satisfied. First, the lands concerned must be federally owned public lands. Second, the public lands must not have been reserved for a public use. Third, a highway must have been constructed on the land.

##### A. Public Lands

R.S. 2477 is a right-of-way grant only over "public lands."<sup>99</sup> The terms "public lands" and "public domain"<sup>100</sup> are synony-

---

1309, 1311 (9th Cir. 1985) (when interpreting statutes, plain meaning of words used is controlling, absent a clearly expressed legislative intention to the contrary).

96. Ferguson, *supra* note 25, at 5.

97. *Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d at 1413 (scope is a federal question) (citing *United States v. Oregon*, 295 U.S. 1, 28 (1934) and *Utah Power and Light Co.*, 243 U.S. at 404 (built power facility without agency permission; R.S. 2339 and R.S. 2340)); *Frank A. Hubbel Co. v. Gutierrez*, 32 N.M. 309, 22 P.2d 225, 226 (1933) (state legislature cannot expand federal grant); *Packer v. Bird*, 137 U.S. 661, 669 (1891) (construe federal grants without reference to state rules of construction).

*Contra Wilkenson*, 634 F. Supp. at 1272 (R.S. 2477 is applied by reference to state law to determine when the offer of grant has been accepted by the construction of highways) (citing *County of Cochise v. Pioneer Nat'l Title Insurance Co.*, 115 Ariz. 381, 565 P.2d 887, 890 (1977)); *Nick DiRe*, 55 I.B.L.A. at 152 (apply local state law). Cf. *Fisher v. Golden Valley Electric Ass'n*, 658 P.2d 127, 130 n.9 (Alaska 1983) (construing ALASKA STAT. § 19.10.010 to allow a powerline within R.S. 2477 right-of-way on private land); *Alaska Greenhouses*, No. A-85-630 Civ. (this issue is currently being litigated in U.S. District Court, Anchorage, Alaska); Bingham, *supra* note 52, at 1.

98. *Humboldt County*, 684 F.2d at 1280 (citing *Andrus*, 436 U.S. at 617 (construe doubts in favor of U.S.)). Compare *Wilkenson*, 634 F. Supp. at 1276 ("government must be deemed to have assented to continued access over the disputed area and cannot cut off that access . . .").

99. *Dillingham Comm. Co. v. Dillingham*, 705 P.2d 410, 413 (Alaska 1985) (R.S. 2477 is applicable to Alaska lands).

100. *United States v. Berrigan*, 2 Alaska 442, 448 (1905) (the vacant, unoccupied and unappropriated lands in Alaska at the date of cession were otherwise considered part of the

mous<sup>101</sup> when used in United States statutes and decisions to designate unreserved federal lands open to the public for sale or other disposal under the general laws of the United States. The terms do not encompass all federally owned lands. Tidelands, submerged lands, lands donated for timber purposes, acquired lands, or Indian/Native lands are not "public lands."<sup>102</sup>

Any valid claim or third-party right to public land (such as private entry) removes the parcel from the public domain. When these rights vest, the land cannot be included in later grants.<sup>103</sup> Actions prior to patent, such as abandonment, relinquishment, or invalidation, would return the excluded parcel to the public domain.<sup>104</sup> A thorough search is required of all the public records to verify that the right-of-way in question does not cross a prior existing right which would invalidate that portion of the claimed right-of-way.

#### B. *Not Reserved for Public Uses*

Next, the R.S. 2477 right-of-way grants apply only to public lands which are "not reserved for public uses." BLM manages the majority of the unreserved federal lands.<sup>105</sup> Public lands reserved for public uses include Indian Reserves, Wildlife Refuges, National Parks,<sup>106</sup> National Forests,<sup>107</sup> Military Reservations,<sup>108</sup> and areas

---

public domain of the United States).

101. *Newhall v. Sanger*, 92 U.S. 761, 763 (1875).

102. *Hamerly*, 359 P.2d at 123. *Bennett County, S.D. v. United States*, 394 F.2d 8, 12 (8th Cir. 1968) (Indian land antedated Act) (distinguished by *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975) (R.S. 2477 applies where Indian allotment postdates Act)). See also 63A AM. JUR. 2D *Public Lands* § 1 (1984); 73A C.J.S. *Public Lands* § 1 (1983).

See generally D. Case, *Rights-of-Way on Allotments—R.S. 2477 and Other Access Questions*, USDI Memorandum to Acting Area Director (May 21, 1980) (available from the Office of the Solicitor, Anchorage Region, Anchorage, Alaska.)

103. *Leavenworth, Lawrence & Galveston Ry. Co. v. United States*, 92 U.S. 733, 745-46 (1875) (general words of grant do not include Indian reservation); *Humboldt County*, 684 F.2d at 1281 (citing *Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 602 (9th Cir. 1981), *declined to follow*, *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985)).

104. See generally Annotation, *Dougald McAllister v. Okanogan County*, 24 L.R.A. (N.S.) 764 (1910) (entry predates highway construction). See also Bingham, *supra* note 52, at 2 (the exact date of return will vary with the individual case circumstances and whether the official land records required notation (the "Tract Book Notation" rule)).

105. 43 U.S.C. § 2 (1982); 43 U.S.C. § 1702(e) (1982).

106. *United States v. 161 Acres of Land, More or Less, in Grand County, Colorado*, 427 F. Supp. 582, 584 (D. Colo. 1977).

107. *Kern River Company*, 38 Pub. Lands Dec. 302, 309 (1909) (§ 9, R.S. 2339, does not authorize construction of rights-of-way across forest preserves citing *Jennison*). Cf. Biddle, *supra* note 47 (private mining access roads on Forest Service lands).

108. *County of Cochise*, 115 Ariz. at 383 (Fort Huachuca).

otherwise segregated.<sup>109</sup> Their reserved status would invalidate a later right-of-way claim.

Deciding whether a public land withdrawal constitutes a "reservation for public uses" may be a complex question.<sup>110</sup> BLM's position is that most, if not all, public lands are now reserved. Even where not reserved for public uses, segregation may remove the lands from public lands status.<sup>111</sup> Several past acts have reserved lands for public uses, such as the Small Tract Act (repealed), the Classification and Multiple Use Act (repealed), and the Recreation and Public Purposes Act.<sup>112</sup> Reserved lands may have reverted back to public lands status upon the termination of the reserving congressional act, presidential order, or departmental classification.<sup>113</sup> Public Land Order (PLO) 4582, as amended,<sup>114</sup> placed all public lands in Alaska in a reserved status. ANCSA<sup>115</sup> repealed PLO 4582 while withdrawing other lands; it was followed by other PLOs withdrawals.<sup>116</sup> Finally, PLO 5418 amended PLO 5189 and withdrew all remaining unreserved federal lands in Alaska on March 28, 1975.<sup>117</sup> FLPMA then revoked R.S. 2477 on October 21, 1976, while Alaska's public lands remained withdrawn, effectively cancelling R.S. 2477 in Alaska on January 17, 1969. The cancellation ended the period for acceptance of the grant in Alaska.<sup>118</sup> Therefore, any right-of-way existing under

---

109. Bingham, *supra* note 52, at 3 (segregation from settlement, location, disposal, and the like, under the public land laws by Act of Congress or by Executive or Secretarial Order, including Public Land Orders (PLO)). See Ferguson, *supra* note 25, at 5.

110. See, e.g., (Exec. Order No. 6910) 54 Interior Dec. 539 (1934) (cited at 55 Interior Dec. 205-07 (1935)); *Wilderness Society*, 479 F.2d at 882 n.90. See generally *Alaska Land Title Ass'n.*, 667 P.2d at 714; Ferguson, *supra* note 25, at 5.

111. Bingham, *supra* note 52, at 3.

112. *Hamerly*, 359 P.2d. at 123 (homestead claim); *Dillingham Comm. Co.*, 705 P.2d at 414 (road acceptance predates valid entry).

113. Bingham, *supra* note 52, at 3. E.g., *Homer D. Meeds*, 83 Interior Dec. at 322-23 (Oregon and California Railroad (O&C) Lands and National Forest Lands).

114. 34 Fed. Reg. 1025 (1969), amended at 34 Fed. Reg. 13,415 (1969) (signed by Alaska's ex-Governor, then Secretary of Interior, Walter J. Hickel). PLO 4582 did not close the lands to mineral discoveries. However, it did foreclose establishment of R.S. 2477 rights-of-way since it had to specifically allow for the establishment of an R.S. 2477 right-of-way from Livengood to the Yukon River, 34 Fed. Reg. 13,415.

115. Pub. L. No. 92-203, 85 Stat. 688, 43 U.S.C. § 1601 (1982), as amended by Act of Jan. 2, 1976, Pub. L. No. 94-204, 43 U.S.C. §§ 1604 (1982), as amended by Act of Nov. 15, 1977, Pub. L. No. 95-178, 43 U.S.C. §§ 1628 (1982).

116. E.g., *Withdrawal of Public Lands for a Utility Corridor*, PLO 5150, 36 Fed. Reg. 25,410-13 (1971) (Trans-Alaska Pipeline); *Withdrawals of Lands in Former Reservations*, PLO 5156, 37 Fed. Reg. 3056-3058 (1972) (former Native Reserves); PLO's 5169-81, 37 Fed. Reg. 5572-87 (1972) (withdrawal for ANCSA selections by village and regional corporations and for classification for lands in withdrawal).

117. 39 Fed. Reg. 11547-48 (1974).

118. "A small window between December 18, 1971, and March 9, 1972, and some

the grant was accepted before January 17, 1969.

### C. *Construction of Highways*

#### 1. *Federal Position*

The federal position is that actual construction of a highway is required to establish an R.S. 2477 right-of-way.<sup>119</sup> The USDI believes that the term "construction"<sup>120</sup> in R.S. 2477 is an essential element of the congressional offer.<sup>121</sup> Relying on a plain meaning argument, USDI contends that the term "construction" as used in R.S. 2477 means more than mere use and more than a track across public lands created by passage.<sup>122</sup> Instead, USDI maintains that "construction" requires actual building of a highway.<sup>123</sup> However, the courts and the IBLA both have held otherwise. A construction requirement would invalidate the state (and Territorial) governments' establishment by statute of section line rights-of-way.<sup>124</sup>

#### 2. *New Jersey Law*

It is noteworthy that Deputy Solicitor Ferguson relies for his definition of "construction of a highway" upon a New Jersey Supreme Court definition of the phrase which appeared in a 1911 state statute. The court had noted: "[We] think that a highway cannot be said to be 'constructed' until it shall have been made ready for actual

---

scattered areas not withdrawn by the 1971-1972 series of PLOs were available for operation of R.S. 2477." Bingham, *supra* note 52, at 4. Penfold, *supra* note 54, at 1. Additional land status research is necessary to establish the precise date of withdrawal of a parcel.

119. Letter from Bruce M. Landon, *supra* note 83. See also *Humboldt County*, 684 F.2d at 1281 n.5 (court must assume construction to apply statute); BLM Manual, § 2801 (B)(1) (Rel. 2-152 9/10/82) (Criteria for Identification of R.S. 2477 Public Highways).

*Contra Blue Mesa Road Association*, 89 I.B.L.A. at 125 n.3 (a public right-of-way may be created by public user); Annotation, *supra* note 49 (citing various state cases allowing acceptance by legislative action).

120. BLACK'S LAW DICTIONARY 283 (5th ed. 1979) ("Construction" is the "creation of something new, as distinguished from the repair or improvement of something already existing. The act of fitting an object for use or occupation in the usual way, and for some distinct purpose.").

121. Bingham, *supra* note 52, at 4. Ferguson, *supra* note 25, at 5.

122. BLM Manual, § 2801(B)(1) (Rel. 2-229 6/30/86). Ferguson, *supra* note 25, at 5.

123. Ferguson, *supra* note 25, at 5; Bingham, *supra* note 52, at 4. *But see* Wolf, *supra* note 10, at 130 ("Construction, including sufficient actual use to amount to construction. . .").

*Contra* Beckley, *supra* note 29, at III, § 1 (by construction or by actual use); Memorandum from Regional Solicitor, Dept. of the Interior, Anchorage, Alaska, 44 L.D. 513—Use and Notation (June 30, 1964) (citing *Hamerly*, acceptance by public authorities or by public use).

124. Wolf, *supra* note 10, at 131 ("[A] section line designation that had not been constructed or used . . . is not valid under RS 2477.").

use as a highway. The word 'construction' implies the performance of work . . . and not the mere delineation thereof, or the taking of land for the purpose of a street."<sup>125</sup>

### 3. *Authorized Public Improvements*

Administrative and judicial federal decisions involving existing roads generally emphasize actual construction. However, they also allow for acceptance of an R.S. 2477 grant by publicly-funded planning or mere use.<sup>126</sup> USDI's position is that a highway constructed through authorized public improvements prior to October 21, 1976, qualifies as an R.S. 2477 right-of-way whether or not it was "constructed" *ab initio*.<sup>127</sup> This reliance upon physical, public improvement eases administrative determination of whether an R.S. 2477 right-of-way existed prior to the enactment of FLPMA.<sup>128</sup> The results benefit BLM's planning and administration programs. However, they simultaneously threaten trails created by user and easements created by statute.

### 4. *Public Improvement of User Created Highways*

BLM believes that although "construction" possibly occurs over time by the passage of vehicles (user), such usage may be insufficient to constitute actual construction. Further, BLM contends that construction by the passage of vehicles may not have developed to the stage of being "constructed" while the public lands were unreserved: "A road originally created merely by the passage of vehicles could have become a highway within the meaning of R.S. 2477 if state or local government had subsequently improved and maintained it by taking measures which qualify as construction."<sup>129</sup> This reliance

---

125. *Paterson & Ramado Ry. Co. v. City of Paterson*, 81 N.J.Eq. 124, 127, 86 A. 68, 69-70 (1912).

126. *Dunn*, 478 F.2d at 444 n.2 (requires construction prior to 1866); both *Humboldt County*, 684 F.2d at 1282 n.6 and *Gates of the Mountains Lakeshore Homes*, 732 F.2d at 1413 n.3 question *Dunn* while evaluating constructed highways; *Nick DiRe*, 55 I.B.L.A. 151 (old Stage Coach Road spur; mere user sufficient under local state law). *Ferguson*, *supra* note 25, at 6; *Bingham*, *supra* note 52, at 4.

*Contra Wilderness Society*, 479 F.2d at 883 (broad definition; public funding for planning enough).

127. *Ferguson*, *supra* note 25, at 8.

128. BLM Manual, § 2801 (B)(1)(c) (Rel. 2-229 6/30/86). *See Ferguson*, *supra* note 25, at 7 (footnotes omitted); *Penfold*, *supra* note 54, at 1. *See also* 120 CONG. REC. 22,283-84 (1974); 43 C.F.R. § 2802.5 (1987) (allows government officials to file with BLM maps of actually constructed public highways).

129. Subsequent improvement must have occurred while the lands were still public lands not reserved for public purposes. BLM Manual, § 2801 (B)(1) (Rel. 2-229 6/30/86);

upon government action to validate the acceptance is not found in the language of section 8.

### 5. *Actual Use*

In contrast to BLM's position; *Central Pacific Railway* implies that an R.S. 2477 highway may be created solely by actual use.<sup>130</sup> However, the question of whether some "construction" is necessary for a highway to exist was not addressed in that case.<sup>131</sup> A few courts have held that where a road comes into existence through passage of vehicles over time, including "construction by non-public entities,"<sup>132</sup> the question becomes whether there is sufficient "public use" to clearly indicate an intent by the public to accept dedication as a highway.<sup>133</sup> Once the right-of-way has been established, its nature is not affected by disuse.<sup>134</sup> An established right-of-way may be abandoned or vacated only in accordance with state law.<sup>135</sup> In addition, section 509(a) of FLPMA<sup>136</sup> allows cancellation and replacement of the right-of-way, with the holder's consent, by the Secretary of Interior.

USDI argues that applying a standard other than actual con-

---

Bingham, *supra* note 52, at 4; Ferguson, *supra* note 25, at 8.

130. *Central Pacific Ry. Co.*, 284 U.S. at 465, 467 (original road in question "was formed by the passage of wagons, etc., over the natural soil . . .").

131. Ferguson, *supra* note 25, at 6.

132. *Wilkenson*, 634 F. Supp. at 1272 (public use of livestock trails, wagon roads, horse trails and footpaths constituted acceptance); *Clarke*, 9 Alaska at 308 (acceptance by user is sufficient); *Blue Mesa Road Association*, 89 I.B.L.A. at 125 n.3 (public user).

133. *Hamerly*, 359 P.2d at 125 ("[d]edication is not an act or omission to assert a right; mere absence of objection is not sufficient. Passive permission by a landowner is not in itself evidence of intent to dedicate. Intention must be clearly and unequivocally manifested by acts that are decisive in character;" desultory use of dead-end road or trail running into wild, unenclosed, and uncultivated country, does not create a public highway); *Dillingham Comm. Co.*, 705 P.2d at 414 (follows *Hamerly* while distinguishing on the facts); *Kirk v. Schultz*, 63 Idaho 278, 284, 119 P.2d 266, 268 (1941) (positive acts on part of public authority clearly manifesting an intention to accept trail as a public highway are required by R.S. 2477, and that use of the trail by public was merely casual and was insufficient to establish the highway); *Leach v. Manhart*, 102 Colo. 129, 133, 77 P.2d 652, 653 (1938) (a road may be a public highway when it provides access to only one land owner); *Dunn*, 478 F.2d at 444 n.2 (R.S. 2477 was not applicable where an easement for a road across public lands had not been readied for claimed road use). *Nick DiRe*, 55 I.B.L.A. at 154-55 (courts look closely at the type of use which a road receives for a clear indication of an intent to accept; the fact that at one time a road or trail may have been created by rolling the "big rocks out of the roadbed" does not establish any historical use. An entryman could have built the road one day and abandoned it the next. Mere existence of the road for fifteen years does not necessarily establish any use of the road). See also *Rippley*, *supra* note 48, at 123.

134. *Murray*, No. 4FA-85-609 Civ., slip op. at 11.

135. *Beckley*, *supra* note 29, at IV, § 3 (F).

136. 43 U.S.C. § 1769 (1982).



struction would create unmanageable administrative difficulties. According to USDI, unless actual use is the standard, "innumerable jeep trails, wagons roads and other access ways—some of them ancient, and some traversed only very infrequently (but whose susceptibility to use has not deteriorated significantly because of natural aridity in much of the West)—might qualify as public highways under R.S. 2477."<sup>137</sup> USDI forgets that these were the types of highways in use in the gold fields at the time the Act was passed. Roads that are created by public use may also meet the test of construction;<sup>138</sup> such roads qualify as highways in Alaska.<sup>139</sup> In the name of administrative effectiveness and cost, USDI wishes to foreclose an unequivocal congressional grant, without limitations as to the manner of establishment, directly to the public for access necessary to the state's economic and social development.

#### D. Highways

No R.S. 2477 right-of-way can be established for a private road.<sup>140</sup> A road constructed and/or maintained prior to October 21, 1976 across unreserved public lands by an appropriate public body,<sup>141</sup> or by an authorized private individual, open to public use, prior to October 21, 1976, across unreserved public lands, establishes a valid R.S. 2477 right-of-way.<sup>142</sup> In past administrative decisions,

137. For an example, see Maps to Be Prepared by County—Indication of Roads, UTAH CODE ANN. § 27-15-3 (1984) (county to map roads within boundaries to the "best of its ability"). See generally Leshy, *supra* note 47, at 436 n.385.

138. *Nick DiRe*, 55 I.B.L.A. at 153 (citing *Montgomery v. Somers*, 50 Or. 259, 90 P. 674 (1907) (public use sufficient to show clear intent to accept)); *Blue Mesa Road Association*, 89 I.B.L.A. at 125 n.3 (public user sufficient); *Sierra Club*, 675 F. Supp. at 604 (under Utah law public use dedicates a highway). See also BLM Manual, § 2801 (B)(1)(a) (Rel. 2-229 6/30/86).

139. *Dillingham Comm. Co.*, 705 P.2d at 414 (highway need only connect two essential transportation arteries without a specific definite termini). *Contra* Bingham, *supra* note 52, at 5.

140. *161 Acres of Land*, 427 F. Supp. at 584 (footpath/horsetrail not a highway under R.S. 2477). See also *United States v. 9,947.71 Acres of Land, More or Less, in Clark County, State of Nevada*, 220 F. Supp. 328, 336-37 (D. Nev. 1963) (found private mining access road was not a public highway, however court applied R.S. 2477 where the grant was accepted by individuals rather than the state).

*Cf.* *Rights of Mining Claimants to Access Over the Public Lands to Their Claims*, 66 Interior Dec. at 365 (distinguished mining roads from public highways). See also BLM Manual, § 2801 (B)(1)(b) (Rel. 2-229 6/30/86). Bingham, *supra* note 52, at 5; Ferguson, *supra* note 25, at 8.

141. *161 Acres of Land*, 427 F. Supp. at 584 (at best, the statute permits construction of public highways by a government body). Bingham, *supra* note 52, at 5.

142. *Mercer v. Yutan Constr. Co.*, 420 P.2d 323, 325-26 (Alaska 1966) (Stampede Winter Trail was constructed by private contractor under the Alaska Access Roads Act). Fer-

USDI has defined a highway. However, state law generally controls the definition of highway<sup>143</sup> for the purposes of establishing the R.S. 2477 right-of-way itself, as well as its width.<sup>144</sup> In 1866, "highway"

---

guson, *supra* note 25, at 8-9. Bingham, *supra* note 52, at 6. *Accord* Penfold, *supra* note 54, at 1.

143. BLACK'S LAW DICTIONARY 656 (5th ed. 1979) (citing *Opinion of the Justices to the Senate*, 352 N.E.2d 197, 201 (Mass. 1976)) (the term 'highway,' as generally understood, does not have a restrictive or a static meaning, but it denotes ways laid out or constructed to accommodate modes of travel and other related purposes that change as customs change and as technology develops, and the term 'highway,' as it is generally understood, includes areas other than and beyond the boundaries of the paved surface of a roadway); *Harris v. Hanson*, 75 F. Supp. 481, 482 (D. Idaho 1948) (highways are roads, streets or alleys laid out, or dedicated, to the public); *Karb v. City of Bellingham*, 61 Wash. 2d 214, 217, 377 P.2d 984, 986 (1963) (a highway is a way open to the public at large); *Mercer*, 420 P.2d at 325-26 (pioneer roads; Stampede Winter Trail constructed under the Alaska Roads Act). See generally Annotation, *supra* note 104 (a railroad is also a highway within the meaning of R.S. 2477).

144. *Girves v. Kenia Peninsula Borough*, 536 P.2d 1221, 1226 (Alaska 1975) (the highway may be established by any method recognized by state law); *Nick DiRe*, 55 I.B.L.A. at 153-54 (citing Limitation of Access to Through-Highways Crossing Public Lands, 62 Interior Dec. at 161) (whatever may be construed as a highway under state law is a highway under R.S. 2477, and the rights thereunder are interpreted by the courts in accordance with the state law); *Rights of Mining Claimants to Access Over Public Lands to Their Claims*, 66 Interior Dec. 361 (1959); *Wason Toll Road*, 22 Pub. Lands Dec. at 146 (right-of-way width is a question of state law). See also BLM Manual, § 2801(B) (Rel. 2-229 6/30/86); ALASKA STAT. § 19.10.015 (1981) (100 feet wide if lands were unreserved after April 6, 1963).

*Cf. Pasadena and Mt. Wilson Toll Road Co.*, 31 Pub. Lands Dec. at 407 (referring to R.S. 2477, USDI Acting Secretary Ryan wrote:

A highway is "a road over which the public at large have a right of passage" (Dic.Loc.V.) and includes "every thoroughfare which is used by the public," and is, in the language of the English books, "common to all the King's subjects" (3 Kent. Com., 432). . . . A highway may be a mere footway. (*Tyler v. Sturdy*, 108 Mass. 196.) Neither the breadth, form, degree of facility, manner of construction, private, corporate, or public ownership, or source or manner of raising the fund for construction and maintenance, distinguishes a highway, but the fact of general public right of user for passage, without individual discrimination, is the essential feature. The necessities and volume of traffic, difficulties of route, and fund available for construction and maintenance, will vary the unessential features, but *the fact of general public right of user for passage upon equal terms under like circumstances is the one constant characteristic of a highway*. The grant of right of way by Section 2477, R.S., is not restricted to those which permit passage of broad, or of wheeled, vehicles, or yet to highways made, owned, or maintained by the public. Highways are the means of communication and of commerce. The more difficult and rugged is the country, the greater is their necessity and the more reason exists to encourage and aid their construction.

(emphasis added)); ALASKA STAT. § 19.45.001(8) (1981 & 1986 Supp.):

Highways includes a highway (whether included in the primary or secondary systems), road, street, trail, walk, bridge, tunnel, drainage structure and other similar or related structure or facility, and right-of-way thereof, and further includes a ferry system, whether operated solely inside the state or to connect with a Canadian highway, and any such related facility.

See generally Hempel, *supra* note 10, at Supp. 1 (PLO 601, Aug. 10, 1949, as amended

was a generic word which possessed connotations different than those held by the modern term. The 1866 definition of highway included common and customary transportation routes.<sup>145</sup>

## V. PERFECTING AN R.S. 2477 RIGHT-OF-WAY UNDER STATE LAW

State courts were the first to decide R.S. 2477 cases. The various state court decisions and statutes are in conflict regarding the perfection of an R.S. 2477 right-of-way.<sup>146</sup>

### A. Four General Rules

State decisions which have dealt with the perfection of R.S. 2477 rights-of-way fall into four general categories.<sup>147</sup> The first category consists of those states that have held that mere statutory dedication establishing a right-of-way along all section lines is sufficient to perfect the grant upon enactment.<sup>148</sup> These states include Kansas,<sup>149</sup> North Dakota,<sup>150</sup> South Dakota,<sup>151</sup> and Alaska.<sup>152</sup> Second,

---

by PLO 757, and S.O. 2665, Oct. 16, 1951), defining width of highways in Alaska "established or maintained under the jurisdiction of the Secretary of the Interior." R.S. 2477 rights-of-way were not established or maintained under the jurisdiction of the Secretary of the Interior. Therefore, these orders cannot be directly applied to an R.S. 2477 right-of-way; *Alaska Land Title Ass'n*, 667 P.2d at 720 (DO 2665 set the width of new construction only); *Murray*, No. 4FA-85-609 Civ., slip op. at 11 (where Alaska Road Commission action is acceptance of grant, the right-of-way width is set by DO 2665). See generally Rippley, *supra* note 48, at 125.

145. Hawkins, *supra* note 58, at 117.

146. See Annotation, *supra* note 49. See generally, Rippley, *supra* note 48, at 123.

147. Bingham, *supra* note 52, at 6. Compare Ferguson, *supra* note 25, at 9. Amicus Curiae Brief, *supra* note 11, at 19.

148. It is interesting that Congress, following the lead of the territorial and state governments of the time, also recognized the importance of reserving section line easements. See Act of May 2, 1890, ch. 182, § 23, 26 Stat. 81, 92 (creating the Oklahoma Territory; reserving a highway easement centered on all section lines in the territory) (codified as 43 U.S.C. § 1095 (1982)). See generally *supra* note 49.

149. *Tholl v. Koles*, 65 Kan. 802, 70 P. 881 (1902) (1867 statutory declaration establishing section line highways).

150. *Small v. Burleigh City*, 225 N.W.2d 295, 298 (N.D. 1974) (open for use without official action), *appeal after remand*, 239 N.W.2d 823 (N.D. 1976). See also 120 CONG. REC. 22,284 (1974) (North Dakota rule cited as appropriate for acceptance of R.S. 2477).

151. *Pederson*, 72 S.D. at 332, 34 N.W.2d at 172.

152. *Girves*, 536 P.2d at 1221 (statutory designation was a valid acceptance of federal offer; upheld validity of section line R.S. 2477 right-of-way) *disapproved on other grounds by* *Bookey v. Kenai Peninsula Borough*, 618 P.2d 567, 569 (Alaska 1980); *Dillingham Commercial Co.*, 705 P.2d at 414 (sufficient public user for acceptance). ALASKA STAT. § 19.10.010 (1981 & Supp 1986 & Supp 1987) ("A tract of 100 feet wide between each section of land owned by the state, or acquired from the state, and a tract four rods wide between all other sections in the state, is dedicated for use as public highways. The section line is the center of

Alaska,<sup>153</sup> Colorado,<sup>154</sup> Idaho,<sup>155</sup> Nevada,<sup>156</sup> Oregon,<sup>157</sup> Wyoming,<sup>158</sup> New Mexico,<sup>159</sup> Utah,<sup>160</sup> and others have held that the public can perfect an R.S. 2477 right-of-way by user without official construction or maintenance.<sup>161</sup> Third, Arizona courts have held that rights-of-way can be established only by a formally dedicated and constructed highway (the apotheosis of administrative convenience).<sup>162</sup>

---

the dedicated right-of-way. If the highway is vacated, title to the strip inures to the owner of the tract of which it formed a part by the original survey."). See also Sedwick, *supra* note 13; 3 AM. L. OF MINING § 73.01(2)(c) (2d ed. 1984).

*Contra* Warren v. Chouteau County, 82 Mont. 115, 123, 265 P. 676, 679 (1928) (R.S. 2477 does not become operative until public acceptance by construction of the highway). See also *Wilderness Society*, 479 F.2d 842 (D.C. Cir. 1973) (federal court found statutory dedication for trans-Alaskan pipeline haul road sufficient).

In addition to its statutory enactment of section line easements, the State of Alaska recorded on Oct. 17, 1962 an "acceptance of unreserved federal lands for highway purposes." This document declared a 100 foot highway centered on all section and half-section lines. See, e.g., Fairbanks Rec. District, 24 Misc. Book 61.

153. *Hamerly*, 359 P.2d at 123 (positive action by public authority or by public user). But see ALASKA STAT. § 38.95.010 (1984) (no adverse possession against state); ALASKA STAT. § 29.70.010 (Supp. 1985) (a municipality may not be divested of title to real property by adverse possession). Accord State of Alaska, 88 Interior Dec. at 635 (R.S. 2477 is not a right obtained merely by prescription) modified on other points.

154. *Nicolas v. Grassle*, 83 Colo. 536, 538, 267 P. 196, 197 (1928) (if access is feasible without work, no work is required). Accord *Wilkenson*, 634 F. Supp. at 1272 (federal court follows Colorado law).

155. *Roper v. Elkhorn at Sun Valley*, 100 Idaho 790, 793-94, 605 P.2d 968, 971-72 (1980) (citing *Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941)).

156. *Anderson v. Richards*, 96 Nev. 318, 608 P.2d 1096 (1980).

157. *Montgomery*, 50 Or. at 265 ("long-continued user" by the public is sufficient to accept). Accord *Nick DiRe*, 55 I.B.L.A. at 153 (relying on *Montgomery*); *Homer D. Meeds*, 83 Interior Dec. at 321.

158. *Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 P. 518 (maintenance or care of highway by the public is not required), *reh'g denied*, 25 Wyo. 416, 418, 171 P. 267, 269 (1917). Compare *Smyth, Rights of Way to Mining Claims Across Public Lands In Wyoming*, 12 WYO. L. J. 162, 164 (1958) (WYO. COMP. STAT. § 48-301 (1945) requires official establishment of highways by the Board of County Commissioners; passed in response to *Hatch Bros.*) with WYO. STAT. ANNOT. § 24-1-101(c) (1977 & Supp. 1987) (Roads "used by the general public for a period of ten (10) years or longer, either prior to or subsequent to the enactment hereof, shall be presumed to be public highways lawfully established as such by official authority. . . .").

159. *Wilson v. Williams*, 43 N.M. 173, 176, 87 P.2d 683, 685 (1939) (citing *Hatch Bros.*, 25 Wyo. 109, 165 P. 518, *reh'g denied*, 25 Wyo. 416, 171 P. 267 (1917)).

160. *Lindsay Land & Live Stock Co. v. Churnos*, 75 Utah 384, 285 P. 646 (1929) (use exceeded territorial statutory period for prescription).

161. See generally Annotation, *supra* note 49. Bingham, *supra* note 52, at 6. Ferguson, *supra* note 25, at 9.

162. See *Tucson Consol. Copper Co. v. Reese*, 12 Ariz. 224, 228, 100 P. 777, 778 (1909) (public roads must be established by statute; county must record location to establish the right-of-way), *questioned in* *Rodgers v. Ray*, 10 Ariz. App. 119, 121, 457 P.2d 281, 283 (1969) (doubtful that a public road can be established by mere use, citing non-R.S. 2477 cases). Accord *County of Cochise*, 115 Ariz. at 384 (establishment by county must comply with

Fourth, Nebraska requires public use plus formal dedication and acceptance.<sup>163</sup>

### B. *Application of State Laws*

USDI believes that under the plain meaning of R.S. 2477 only the Arizona interpretation of construction is correct and that the other state positions do not meet the statute's express requirements. For example, Alaska's section line easement law does not require a constructed highway. Also, in Alaska, Colorado, Utah, New Mexico, Oregon, and Wyoming, the public may establish an R.S. 2477 right-of-way by user alone, without official construction. USDI believes the term "construction" is "an essential element of the congressional grant; otherwise, Congress' use of the term is meaningless and superfluous."<sup>164</sup> However, the IBLA, with few exceptions, has followed the state law where the right-of-way is located, which in Alaska includes public user.<sup>165</sup> The recognition of user as construction and acceptance seems a logical outgrowth of the pre-1866 history of R.S. 2477, given that Congress clearly sought in the 1866 Act to validate uses of the public domain associated with development.

## VI. BLM REGULATION OF AN ESTABLISHED RIGHT-OF-WAY

### A. *Control of the Estate*

Federal regulation of an established right-of-way reflects a much narrower policy than can be found in R.S. 2477. Use of a valid R.S. 2477 right-of-way over federal lands is limited because the congressional grant is for a right-of-way or easement<sup>166</sup> for public highway use<sup>167</sup> and only highway uses.<sup>168</sup> Title to the underlying

---

applicable laws).

163. *Streeter v. Stahnaker*, 61 Neb. 205, 207, 85 N.W. 47, 47 (1901) (dedication and acceptance following user):

164. *Ferguson*, *supra* note 25, at 9. *Accord* *Bingham*, *supra* note 52, at 7.

165. *E.g.*, *Leo Titus, Sr.*, 92 Interior Dec. 586 (citing *Hamerly* acceptance is by state law, either public user or statute in Alaska). Recently the Public Land News quoted the I.B.L.A. as stating its decisions represented final agency action. 12 Public Land News 8 (June 25, 1987).

166. *Wason Toll Road Co.*, 21 Pub. Lands Dec. at 354 (right-of-way is an easement), *aff'd*, 22 Pub. Lands Dec. 145 (1896); *State of Alaska*, 88 Interior Dec. at 634 (R.S. 2477 is a less-than-fee interest). *See also* 43 C.F.R. § 2801.1 (1986).

167. *161 Acres of Land*, 427 F. Supp. at 584; *Dillingham Commercial Co.*, 705 P.2d at 415 (used for any purpose consistent with public travel). *See generally* *Nick DiRe*, 55 I.B.L.A. 151.

168. *Gates of the Mountains*, 732 F.2d at 1413 (underground electrical powerline is in trespass); *Penasco Valley Telephone Cooperative, Inc.*, 55 I.B.L.A. at 362 (buried telephone

public lands remains federal, until fee is patented.<sup>169</sup> Therefore, other permits and rights-of-way within the R.S. 2477 may be approved. These other permits and rights-of-way allow nonintervening, ancillary uses compatible with the primary highway use.<sup>170</sup> USDI may also, in compliance with state law and with the grant holder's consent, vacate the right-of-way and provide alternate access.<sup>171</sup>

### B. *Non-Highway Uses*

On the public lands BLM may challenge the R.S. 2477 right-of-way whenever use exceeds the rights granted.<sup>172</sup> Therefore, non-highway uses within, or adjacent to, the R.S. 2477 right-of-way require BLM's authorization.<sup>173</sup> Appropriate use of the R.S. 2477 right-of-way generally will not be a BLM concern nor will BLM seek to regulate such uses.<sup>174</sup>

## VII. CONCLUSION

### A. *State Policy*

Loss of historic R.S. 2477 access will result in great public expense to provide alternate access. Publishing a clear state policy and coordinated procedure for right-of-way assertion to the agencies of the federal government is a critical first step in the assertion of R.S. 2477 claims.

---

cables in trespass); *Mountain Bell*, 83 I.B.L.A. at 68 (buried telephone cables in trespass); *Mountain States Telephone & Telegraph Co.*, 84 I.B.L.A. at 2 (third-party buried telephone cable in trespass). See also BLM Manual, § 2801(B)(4) (Rel. 2-229 6/30/86); Bingham, *supra* note 52, at 8.

169. *Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967) (U.S. had title to the servient mineral estate); *Dillingham Comm. Co.*, 705 P.2d at 415 (a right-of-way creates only a right-of-use); *Nick DiRe*, 55 I.B.L.A. at 152-153 (citing *Limitation of Access to Through-Highways on Public Lands*, 62 Interior Dec. at 161 (citing Eugene McCarthy, 14 Pub. Lands Dec. 105 (1892))); *W.S. Burch*, 45 Pub. Lands Dec. 473, 475 (1916) (land remains open for disposal); *State of Alaska*, 88 Interior Dec. at 634; *Leo Titus, Sr.*, 92 Interior Dec. at 585 (convey subject to existing right-of-way).

170. *State of Alaska*, 88 Interior Dec. at 635 (overlying ANCSA § 17(b) easement); *Leo Titus, Sr.*, 92 Interior Dec. at 588 (ANCSA 17(b) easements); 43 C.F.R. § 2801.1 (1986); Penfold, *supra* note 54, at 1.

171. *Mountain Bell*, 83 I.B.L.A. at 69 (applying FLPMA § 509(a) to R.S. 2477 rights-of-way); 43 U.S.C. § 1769(a) (1982). See also Rippley, *supra* note 48, at 131.

172. 43 C.F.R. § 2803.3 (1986). See also *Homer D. Meeds*, 83 Interior Dec. at 323; *Leo Titus, Sr.*, 92 Interior Dec. at 587.

173. Bingham, *supra* note 52, at 8. Cf. *Vogler*, No. A84-289 Civ. at 42-43 (Park Service).

174. See generally 43 C.F.R. § 2801.4 (1986); Bingham, *supra* note 52, at 8.

### B. *Federal Adjudication*

Requirements that state assertions must satisfy BLM, together with BLM's refusal to note potentially valid claims, in a context of supposed neutrality (simple notation of a claim), amounts to an adjudication of invalidity without a hearing. This administrative road block should be removed because it acts to constrain the congressional offer.

### C. *User as Actual Construction*

The federal requirement of actual construction is not solidly based in case law or historic precedent. The New Jersey rule proposed by Deputy Solicitor Ferguson requiring actual construction clearly is inappropriate in Alaska due to high construction costs and climatic extremes. Reliance upon physical, public improvement eases administrative determination of whether an R.S. 2477 right-of-way existed prior to enactment of FLPMA. The results both benefit BLM's planning and administration programs and threaten trails created by user or easements created by statute. The recognition of user as construction and acceptance seems a logical outgrowth of the pre-1866 history of the statute, through which Congress clearly sought to validate existing developmental uses of the public domain.

### D. *Federal-State Agreement*

The critical second step to claim resolution is a workable federal-state agreement expediting the notation of existing historic access. R.S. 2477 assertion is simply for planning identification. It is not required by the Act, and does not possess the permanency of a judicial right-of-way determination. Prompt right-of-way notation is necessary for inclusion of rights-of-way in ongoing federal planning decisions, mapping, and master title plats. Meeting the standard imposed by the Department of Interior exceeds that required for location and planning, and results in an undue burden upon the public by frustrating access preservation. This process will result in inconsistent and untimely judicial decisions. Additionally, the process will place a burden on the public purse.

Negotiations at the administrative level between interested parties would provide an expeditious method of sorting out the disputed claims after the asserted rights-of-way have been documented on the official records. In addition, this process would produce a full record on which to base any necessary litigation.